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Nos. 195, 196, and 197

In the Supreme Court of the United States

OCTOBER TERM, 1935

UNITED STATES OF AMERICA, PETITIONER

v.

BANK OF NEW YORK AND TRUST COMPANY

UNITED STATES OF AMERICA, PETITIONER

v.

PRESIDENT AND DIRECTORS OF THE MANHATTAN COMPANY

UNITED STATES OF AMERICA, PETITIONER

v.

LOUIS H. PINK

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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REPLY BRIEF FOR THE UNITED STATES

As the briefs of the three respondents in these actions contain substantially the same arguments, this reply is addressed in general to the arguments

in the three briefs, and specifically to the contentions of the respondent in *United States* v. *Bank of New York and Trust Company.*

EFFECT OF FOREIGN LAW

Respondents rely upon the axiom that the law of one country can have no extraterritorial force *ex proprio vigore* in another country. That general proposition the United States does not dispute. It is, however, the contention of the United States that in the determination of certain legal relationships the courts of this country, in applying our own law, recognize the *effect* of foreign law upon those relationships, and further that this is true even though the property which may be used to satisfy the successful litigant may for some purposes be deemed to have a situs within the United States. This is the principle to which this Court gave approval in the following language in *Canada Southern Ry. Co.* v. *Gebhard,* 109 U. S. 527, at page 536:

> That the laws of a country have no extraterritorial force is an axiom of international jurisprudence, but *things done in one country under the authority of law may be of binding effect in another country.* (Italics ours.)

And at page 537:

> A corporation "must dwell in the place of its creation, and cannot migrate to another sovereignty" (*Bank of Augusta* v. *Earle,* 13 Pet. 588), though it may do business in all

> places where its charter allows and the local laws do not forbid. *Railroad* v. *Koontz,* 104 U. S. 12. But wherever it goes for business it carries its charter, as that is the law of its existence (*Relf* v. *Rundel,* 103 U. S. 226), and the charter is the same abroad that it is at home. * * * Such being the law, it follows that every person who deals with a foreign corporation impliedly subjects himself to such laws of the foreign government, affecting the powers and obligations of the corporation with which he voluntarily contracts, as the known and established policy of that government authorizes.

As in the *Gebhard* case, the legal relationships involved in the instant actions are rights in and to the property of a foreign corporation. Canadian law was held to govern the rights asserted in that case; so should Russian law be held to govern the rights asserted in these actions. In the following additional cases, in which the property of the debtor was found within the jurisdiction, the court gave effect to the primary obligation as interpreted by the foreign law which created the obligation:

Deutsche Bank v. *Humphrey,* 272 U. S. 517, where the measure of damages was held to be the same under our law as under German law at the time of the commencement of the action;[1]

Zimmerman v. *Sutherland,* 274 U. S. 253, where an obligation created by Austrian law and extinguished by Austrian law was held unenforceable;[2]

[1] See petitioner's main brief, p. 45.

[2] See petitioner's main brief, p. 46.

Dougherty v. *Equitable Life Assurance Society*, 266 N. Y. 71.

Lazard Bros. & Co. v. *Midland Bank, Ltd.* (1933) A. C. 289, where it was held that a British creditor of a dissolved Russian corporation could not reach the assets of that corporation in England, since no judgment could be obtained against the corporation after its dissolution by Russian law.[3]

The effect of Russian law on the assets of these Russian corporations was recognized in the majority opinion in the Circuit Court of Appeals in the following language:

> It [the Russian State] could, and did, acquire for itself every right the corporation in Russia possessed. *It became the corporation there so far as we are now concerned.* It had all its property and rights as fully as though the corporation had lawfully assigned them to it before dissolution. *To that extent our public policy as to confiscatory decrees, so far as it may be expressed by our courts, is of no moment.* When the executive branch recognized the Soviet Government, the judicial branch became bound to recognize the validity of Soviet decrees in Soviet territory from the beginning of the Soviet regime. [Citing cases.] Consequently we must for present purposes take *the Soviet Government to have become* to all intents and purposes *the Russian insurance corporation in Russia which owned the deposit in New York* subject to the fulfillment

[3] See petitioner's main brief, pp. 31–33.

> of the conditions upon which the deposit was made with the New York Superintendent of Insurance. (Italics ours.)

THE FIFTH AMENDMENT

Respondents also contend that the Fifth Amendment constitutes a declaration of public policy to the effect that no person, including an alien, shall be deprived of his property through a foreign statute characterized as "confiscatory", and that therefore the legal relationships between a Russian corporation and creditors and stockholders of that corporation, which were altered by such statutes, must be regarded as unaffected thereby. And further they contend that persons possessing rights against these corporations, before the alteration of these rights by Russian law, must be permitted to assert them in the United States against an American debtor.

In reply to these contentions it must be noted that the Fifth Amendment constitutes a limitation on the powers of Congress and that it does not constitute a declaration of public policy in respect to the enforceability of rights in instances, like those presented in these cases, in which these rights were originally created by the law of a foreign sovereign and were subsequently extinguished or changed by the same law. In these actions no statute passed by Congress is involved. The Fifth Amendment has, therefore, no application. The very language quoted by the respondents from *Russian Volunteer Fleet* v. *United States,* 282 U. S. 481, 492:

> The provision that private property shall not be taken for public use without just compensation establishes a *standard for our Government* which the Constitution does not make dependent upon the standards of other governments. The Act of Congress should be interpreted in the light of its manifest purpose to give effect to the constitutional guaranty. (Italics ours.)

makes it clear that in so far as concerns the taking of private property our government and foreign governments may each choose their own standards.

"CONFISCATION"

Respondents have also argued that the title of the United States to the funds in question is unenforceable because it is a title based upon laws of the Soviet Union which are characterized as "confiscatory." In so arguing they postulate that the title of the Soviet Government to these funds is no better than a robber's possesison. This view overlooks the fact that the acquisition by the Soviet Government of all private property wherever situated owned by Russian nationals was an essential feature in the establishment for the Russian people of a theory of government, never before attempted on a comparable scale, and based upon national ownership, rather than private ownership, of the national wealth. The property so acquired was, according to these economic theories, to be employed in the furtherance of the national welfare. Clearly, a title acquired under such circumstances

cannot be dismissed by invoking a doctrine based upon the protection of private citizens against larceny. The Court of Appeals of New York rejected the same contention in the following language in *Dougherty* v. *Equitable Life Assurance Society*, 266 N. Y. 71, at page 83:

> In Russia, where all these insured were, with one or two exceptions, these decrees were laws to be obeyed. They were the laws of their government. *As to them the Soviet Republic was no body of bandits, confiscating property, but an existing government, carrying out new theories of insurance.* If the Russian people, under their Soviet form of government, determined to abolish all private insurance for their citizens and establish a system of social protection by the State, that was their affair, not ours, and however objectionable we may consider the monopolization of all business, including insurance and banking, and the conduct of it thereafter by the government, we at least must admit that other peoples can try the experiment if they desire. (Italics ours.)

THE PUBLIC POLICY OF NEW YORK

Respondents also contend that there is a public policy of the State of New York which requires that any and all assets owned by a foreign corporation and found within the state shall be applied to the satisfaction of any and all claims asserted thereagainst, regardless of the nature of the claims and where they arose. As supporting their contentions, each of these respondents has deemed it appropri-

ate to cite an excerpt from the decision of the New York Court of Appeals in *Matter of People* (*City Equitable Fire Ins. Co.*), 238 N. Y. 147, 156.[4] It is stated in the *Bank of New York* brief, at p. 19:

> As said by the Court of Appeals in *Matter of People, City Equitable Fire Insurance Company* (238 N. Y. 147, 156) in speaking of a *foreign* insurance corporation taken over by the Superintendent of Insurance under the provisions of Section 63 of the Insurance Law:
>
> "The Superintendent is not, therefore, to take possession of the property solely for the benefit of creditors or policyholders in this State or in the United States but for the interest of all its policyholders, creditors and stockholders wherever they may be. He is to liquidate the business here for that purpose."
>
> (Italics ours.)

The court was not there referring to a foreign corporation. In using that language, the court was speaking of the situation with respect to the liquidation of *domestic* corporations, as covered by Section 63 of the insurance law. The case actually concerned what should be done with the surplus assets of the City Equitable Fire Ins. Co., a *foreign* corporation. And the opinion, therefore, proceeds to deal precisely with that question, using the fol-

[4] This excerpt is quoted in the brief of the *Bank of New York and Trust Company* at pages 19 and 51; in the brief of the *Manhattan Company* at page 27; and in the brief of *Pink* at page 36.

lowing language, to which respondents make no reference (p. 156):

> In the case of a foreign corporation the liquidation may be but partial. The funds deposited with the Superintendent are primarily for the benefit of its policyholders in the United States. Having realized on these funds, having taken possession of all the assets of the corporation within his reach, having satisfied the claims of such policyholders and of local creditors, what is he to do with the surplus? We think the statute implies the necessary answer. He is an ancillary receiver of a foreign corporation. The very word "ancillary" means subordinate or auxiliary to the principal. * * * He is, therefore, "to assume administration in aid of the primary receiver." * * * *If there remains a surplus in his hands after all proper charges and claims have been deducted this must be transferred to the receiver of the domicile.* (Italics ours.)

The decision of the court was as follows (p. 158):

> We hold that under that section [63] once the Superintendent has taken possession of the assets of a foreign insurance corporation, no lien by attachment may be acquired upon these funds, and that when the trust confided to him has been fully administered any surplus remaining must be transmitted by him to the officer at the corporation's domicile having general control of the winding up or dissolution of such corporation.

This case was followed in *Matter of People (Norske-Lloyd Ins. Co.)*, 242 N. Y. 148, which involved the surplus assets of a Norwegian corporation.

We submit, therefore, that the general rule, under New York law, as under the law of other States, is that when domestic claims have been satisfied, any surplus remaining must be remitted to the domiciliary liquidator.

This rule has been adopted in *Restatement of Conflict of Laws*, Sec. 161, as follows:

> If a statute of the state of incorporation which is in force at the time of the dissolution of a corporation provides that all its assets shall, upon dissolution, pass to a person designated in the statute, the right of such person to the personal property, wherever situated and whether tangible or intangible, will be recognized and given effect by other states, and the designated person can bring suit in any State upon claims due to the corporation.

In connection with the insurance companies involved in these cases, however, the Court of Appeals ruled in its decisions in 1931 that there was no domiciliary liquidator whom it could recognize, in view of the nonrecognition of the Soviet Government by the United States Government. Hence the Court of Appeals felt impelled to make a limited exception to the general rule, and therefore instructed the Superintendent of Insurance to liquidate any foreign claims which were presented

within a certain time; but in the same decisions it was stated that after that time, the Superintendent and our courts should have no further responsibility for the disposition of these assets.

Since recognition of the Soviet Government, the practical difficulty which the New York court faced in 1931 no longer exists. Hence there is no longer any reason why the general rule of New York, as laid down in the *City Equitable* case, cannot be or should not be followed.

In regard to the First Russian Insurance Company, the New York Court of Appeals said, in 255 N. Y. at 427:

> The surplus assets in this State are but a part of the total assets to be administered abroad. We disclaim a continuing duty of visitation and supervision. * * * Our administrative machinery should be no longer clogged, our liquidator no longer burdened, our courts no longer vexed, with problems not our own.

On pages 18–19 of the *Bank of New York* brief appears the following statement:

> It is the law and public policy of the State of New York that upon the dissolution of a corporation its assets are not subject to confiscation or escheat but are to be regarded in equity as the property of the corporate creditors and shareholders, and are to be administered and distributed as such.

To support this proposition five cases are cited. All of these cases concern corporations organized

under the laws of New York. Whether the above statement is or is not supported by these authorities, and whatever may be the theory the New York Courts have adopted as to the ownership of corporate property after the dissolution of a New York corporation, we submit that this theory has no application to the determination of rights in the surplus assets of a dissolved Russian corporation merely because that corporation happened to have in New York in 1925 more assets than were required to respond to the claims of its domestic creditors.

Hence there is no public policy or law of the State of New York that claims of Russian nationals against the Russian Government shall be enforced against assets in the State of New York. On the contrary, we submit that if there is any public policy involved herein, it is all in favor of upholding the title of the United States to these surplus funds. The assignment clearly states that it is made "preparatory to a final settlement of the claims and counterclaims between the governments of the Union of Soviet Socialist Republics and the United States of America and the claims of their nationals." The action of the United States Government in accepting this assignment was therefore in furtherance of its policy to protect American interests in connection with claims arising out of the revolution in Russia.

THE SITUS OF THE SURPLUS ASSETS

Respondent Bank of New York (at pages 9–13) argues that since legal title to the assets of Moscow Fire Insurance Co., prior to the possession of them by the Superintendent of Insurance, was in New York domiciliaries, and that only an equitable title in the surplus assets (i. e., assets not required to respond to the claims of creditors based on domestic transactions) was possessed by the Russian corporation, the situs of this property for all purposes and at all subsequent times must be deemed to be New York. The record does not disclose whether or not at the time the Superintendent of Insurance took possession the legal title to all of the assets of this Russian corporation in New York was or was not vested in New York domiciliaries. But even assuming the accuracy of respondent's statement, it by no means follows that the equitable interest possessed by the Russian corporation in the surplus assets could not have a situs in Russia for the purpose of transfer of title to this equitable interest, as between the Russian corporation and the state which created it. The Court of Appeals of New York, in *Severnoe Securities Corp.* v. *London and Lancashire Ins. Co.*, 255 N. Y. 120, stated as follows at page 123:

> The situs of intangibles is in truth a legal fiction, but there are times when justice or convenience requires that a legal situs be ascribed to them. The locality selected is for some purposes, the domicile of the credi-

> tor; for others, the domicile or place of business of the debtor, the place, that is to say, where the obligation was created or was meant to be discharged; for others, any place where the debtor can be found [citing cases] * * *. What we are to determine in the case at hand is the locality to be chosen for the exercise by conservators of powers born of an emergency. For that purpose, if not for others, the situs of the chose in action, the subject of this claim, is in England and perhaps in Russia, but certainly not here.

The same court in *Russian Reinsurance Co.* v. *Stoddard,* 240 N. Y. 149, stated at page 167:

> We have pointed out that the existence of the corporate plaintiff, its right to sue, the authority of the directors and *the devolution of title to its assets* must all be determined by the Russian law.

JURISDICTION OF NEW YORK COURTS OVER THE PENDING ACTIONS

Contrary to its position in its briefs in the courts below and in its brief in opposition to the petition for certiorari, respondent Bank of New York (pp. 44–45) now refers to the state court proceedings commenced in April 1933 as a suit instituted by Paul Lucke, to whose name as plaintiff "was added the name *Moscow Fire Insurance Co.*" This is a belated attempt to make this action appear what it is not, namely, an action brought by a plaintiff having a legal existence. The plaintiffs in that action, according to the complaint (R. p. 12), are "Moscow

Fire Insurance Company and Paul Lucke, as sole surviving director of Moscow Fire Insurance Company, and Conservator of its property." In April 1933 Moscow Fire Insurance Company had been legally nonexistent for many years. Consequently, it could not by appearing as a plaintiff in New York courts give those courts jurisdiction, whether *in rem* or *in personam,* over the subject matter of the action. Paul Lucke, as a representative of the corporation, whether as surviving director or as Conservator, had no more legal capacity as a representative of the corporation than had the corporation itself. His status as surviving director had been terminated many years previously by the law of Russia, and the New York court had no power to name him conservator of any property formerly owned by this corporation in New York. *Issaia* v. *Russo-Asiatic Bank,* 266 N. Y. 37.

It clearly appears, therefore, that the "Lucke suit" is one over which the New York courts had no jurisdiction. It is immaterial, therefore, to determine whether that suit is *quasi in rem* (as stated on page 45 of respondent's brief) or *in rem* (as stated on page 49 of respondent's brief), or whether it is *in personam.* In any event, it is not an action to which the rule of priority of jurisdiction can apply.

Respondent Manhattan Co. asserts at page 12 of its brief:

> In the instant case the defendant acquired title to the fund in suit as the result of an

> assignment by the Northern Insurance Company of Moscow, to wit, in 1932, more than a year prior to the recognition of the Russian government.

In 1932, however, the Northern Insurance Company of Moscow had ceased to exist for many years. Consequently, not having at that time title to any assets, it could not transfer title to the respondent bank.

In *Relfe* v. *Rundle,* 103 U. S. 222, a receiver had been appointed in Louisiana by a state court who had possession of Louisiana assets of a Missouri insurance corporation. Thereafter the statutory successor of this corporation by Missouri law intervened in the Louisiana action, and sought to remove it to a Federal court. In opposition to this removal it was urged that the prior possession of the state court could not be disturbed. In holding that removal was proper under these circumstances, this Court stated, at pp. 224–226:

> We think the Circuit Court erred in remanding the cause. The entire controversy is between the appellees, representing the Louisiana creditors and policy-holders, on one side, and Relfe [Missouri statutory successor], the statutory representative of the corporation and its property, on the other, as to their respective rights to what the appellees claim are Louisiana assets belonging primarily to Louisiana creditors. Fell and the receiver of the Columbia Life Insurance Company are formal parties only. Fell

> [Louisiana receiver] has in his possession, as a naked trustee, some of the Louisiana assets, and the receiver of the Columbia Life Insurance Company is, so far as anything appears, no more than a general creditor of the dissolved corporation whom, necessarily, under the law, Relfe represents. After the decree of dissolution the Life Association Company had no longer any corporate existence, and the temporary agency and receivership of Frost was ended when the property of the corporation was transferred to Relfe and he became under the law entitled to the possession.
>
> * * * * *
>
> Relfe, therefore, became, by operation of law, the successor of the corporation in the litigation these appellees instituted in Louisiana. He was, in legal effect, their only opponent in the suit they had begun, and as he appeared in time and was a citizen of Missouri, representing a Missouri corporation, he was entitled to remove the cause and require citizens of Louisiana to litigate their claims with him in the courts of the United States.

DECISIONS IN ENGLAND

Respondent Bank of New York (p. 30), seeks to distinguish the decision of the House of Lords in *Lazard Bros. & Co.* v. *Midland Bank, Ltd.* (1933), A. C. 289, by stating that it was not concerned with the ownership of assets outside of Russia of a dissolved Russian corporation. This decision, how-

ever, annulled a judgment which would have permitted the plaintiff to recover a cash balance in favor of a Russian Bank on the books of an English Bank. It will thus be seen that the decision bore directly on assets of a Russian corporation situated in England.

A further effect of this decision is, in substance, to overrule previous decisions of the House of Lords and of other English courts on which the three respondents rely.[5] These cases are *Russian Commercial & Industrial Bank* v. *Comptoir d'Escompte de Mulhouse* (1925) A. C. 112, *Banque Internationale de Commerce de Petrograd* v. *Goukassow* (1925) A. C. 150, and *Employers' Liability Assurance Corporation, Ltd.*, v. *Sedgwick, Collins and Company, Ltd.* (1927) A. C. 95. Likewise, the decision impairs the authority of *The Jupiter* (1927) P. 122, aff'd (1927) P. 250, in that the courts in the latter decision had adjudicated the effect of Soviet decrees on a vessel situated outside of Russia, in reliance upon previous House of Lords decisions which the *Lazard* case overruled. One of the grounds for the decision in *The Jupiter, supra,* was that before the assertion of ownership over the vessel by the Soviet Government, title to it had been vested in a French official, by the decree of a French court having jurisdiction over the vessel. The latter's title was held valid as against the title derived through a subsequent seizure by the

[5] See petitioner's main brief, p. 33.

Soviet Government. Neither of the grounds on which the decision in *The Jupiter* were placed is therefore relevant in the instant actions.

In the only cases in English courts in which the Soviet Government appeared as the plaintiff, as successor to prior Russian governments, to recover property situated in England, it was permitted to recover. These cases are *Union of Soviet Republics* v. *Belaiew*, 42 T. L. R. 21 (K. B. 1925), and *U. S. S. R.* v. *Onou*, 69 Sol. J. 676 (1925).

CONCLUSION

We submit that the decision below is erroneous and should be reversed.

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